July 23, 2018

Via ECFS

Notice of Ex Parte

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

Re: **Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, WC Docket No. 17-84; Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, WT Docket No. 17-79**

Dear Ms. Dortch:

On July 19, 2017, Nick Alexander and Craig Brown, counsel, and Tim Walden, Senior Vice President of Local Network Implementation, CenturyLink, met with Jay Schwarz of the Chairman's office and, separately, with Commission staff: Lisa Hone of the WCB front office, Richard Kwiatkowski and Marv Sacks of WCB/PPD, and Adam Copeland, Annick Banoun, Matt Collins, Deborah Salons, and John Visclosky of WCB/CPD to discuss the above captioned proceedings.

Overlashing

In the meetings, CenturyLink reiterated its support for the draft order's codification of the Commission's overlashing precedent. Under that precedent, an attacher may overlash its existing pole attachments with telecommunication wire, including fiber-optic cable, fiber splice closures, and similar incidental equipment, without the utility pole owner's prior approval.[1] That precedent does not apply, however, to equipment that is not incidental to overlashed telecommunications lines, such as strand-mounted antennas and other RF-emitting devices, batteries and power supplies. Those types of equipment are much more likely to present safety, load, and interference issues that should be addressed through the pole attachment process, as modified in this proceeding.[2]

[1] *See* Letter from Craig J. Brown, CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84 (Apr. 6, 2018).

[2] *Id.* at 4.

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Given that it would adopt the Commission's "longstanding" overlashing policy,[3] the draft order implicitly incorporates this limitation. But, for the sake of avoiding potential disputes, CenturyLink asks the Commission to clarify that this streamlined overlashing process does not apply to non-incidental equipment. The Commission can do this with a few simple changes highlighted in the Appendix to this submission.

Allowing for the pole owner's prior review and approval of this equipment is essential to maintain safety, reliability, and engineering standards. Attachments in the communications space can be located as close as one foot to each other, potentially exposing pole workers to unsafe levels of radiation from a nearby attacher's RF device. CenturyLink therefore requires RF-emitting equipment attached to its poles to be appropriately labeled and to include shut-off switches so that pole workers can take proper precautions when working near such equipment. Strand-mounted RF equipment also could interfere with services provided over other nearby attachments, such as copper-based DSL services. The weight and configuration of strand-mounted antennas, power supplies, batteries and other similar equipment also can create considerably more sag, wind and ice loading, and stress on the pole than was anticipated in the engineering design and analysis performed for the original attachment to which the equipment is appended.

CenturyLink recognizes that the draft order would allow utilities to establish "reasonable pre-notification" requirements for overlashing of up to 15 days, during which the utility could conduct its own engineering analysis and, if appropriate, provide the attacher specific documentation demonstrating that the overlash would create a capacity, safety, reliability, or engineering issue, which the attacher would have to address before continuing with the overlash.[4] This notice-only process would be an insufficient substitute, however, for the Commission's standard pole attachment process. For example, it is not clear in the draft order whether utilities would be permitted to require an attacher to provide detailed information about its proposed overlash, such as an engineering load analysis, as part of the pre-notification process. A process requiring a complete application for strand-mounted equipment ensures that issues, including pole loading, capacity, engineering standards, and safety codes are addressed upfront, as they should be for such equipment. Indeed, the draft order recognizes that the submission of detailed information, such as pole loading analyses, can be an important tool to address safety, reliability, and engineering concerns.[5] Without such detailed information, it is unlikely a pole owner can engage in a meaningful analysis of a proposed overlash within 15 days. Thus, the pole owner may discover a safety, load, or design problem with an overlash only after the overlash has been installed and possibly only after that concern has caused damage to life or property.

The inadequacy of a 15-day notice period is demonstrated by the draft order's retention of a 45-day period for pole owners to review a standard pole attachment application and survey the affected poles *after* it receives a complete application with all the information necessary for the pole owner to make an

[3] Draft Order at ¶ 107.

[4] *Id* at ¶ 108.

[5] Draft Order at ¶¶ 54, 73.

informed decision.[6] In retaining this 45-day timeline for application review and survey, the draft order declined to shorten this period, because of demands on existing workforce, safety concerns, the volume of pole attachment applications, and timing constraints.[7] These same factors would come into play with proposals to strand mount RF equipment, batteries, power supplies, and other non-incidental equipment to existing attachments not originally designed for such equipment.

The draft order's notification process would also shift the administrative burden and cost of performing an engineering load analysis and other review of an overlash from the attacher to the pole owner, without any way for the pole owner to recover these costs. That shift is arguably acceptable in the case of wire-to-wire overlashing, in which the overlash is of similar character to the original attachment and therefore less likely to raise safety, load, or design concerns. But it is not appropriate for antennas, batteries, power supplies and other similar equipment, the characteristics of which may well be materially different. Proposals to append such equipment to existing attachments should be reviewed through the standard pole attachment process through which a pole owner is appropriately compensated by the cost causer (i.e., the attacher).

Allowing the overlash of RF and other strand-mounted equipment to occur outside of the pole attachment process also would conflict with the draft order's definition of "complex" make-ready, which the draft order found to be not appropriate for the OTMR process. The draft order defines complex make-ready as transfers and work reasonably likely to cause service outages or facility damage, including work such as splicing of any communications attachment or relocation of existing wireless attachments. This definition would specifically exclude wireless attachments from the OTMR process, finding that these attachments "involve unique physical and safety complications that existing attachers must consider (e.g., wireless configurations cover multiple areas on a pole, considerably more equipment is involved, RF impacts must be analyzed)[.]"[8] Put simply, it would be illogical and unreasonable for the Commission to require the attachment of wireless equipment to a pole to be reviewed through the standard pole attachment process, while allowing the attachment of these facilities to a wire on the same pole without any formal prior review. The Commission therefore should confirm in the final version of the order that non-incidental equipment is excluded from the overlash process, by adopting the changes outlined in the Appendix.

One Touch Make Ready

In its prior submissions in this docket, CenturyLink supported the concept of *voluntary* OTMR processes but cautioned against making such processes mandatory, given the host of unresolved concerns implicated by a new attacher moving existing attachers' and pole owners' facilities without permission.[9]

[6] Draft Order at ¶ 75.

[7] *Id.*

[8] *Id.* at ¶ 18.

[9] *See, e.g.*, Comments of CenturyLink, WC Docket No. 17-84, at 12-16 (filed June 15, 2017).

As discussed in its meetings with Commission staff, CenturyLink continues to be concerned about a mandatory OTMR process even for simple make-ready. The Commission could at least partially address those concerns by adopting the following changes to that process.

Indemnification. While the draft order correctly concludes that new attachers are responsible for any damage they cause during the OTMR process, it finds that federally-imposed indemnification is unnecessary because the existing legal regime, including contract and tort law, provides sufficient protection. CenturyLink disagrees. Existing attachers are unlikely to have a contractual relationship with new attachers outlining the responsibilities between the parties.[10] Disputes are therefore likely if any damage to existing attachments occurs, particularly if that damage is not discovered until after the 30-day inspection period contemplated in the draft order. Without Commission-imposed indemnification, such disputes will have to be resolved through litigation, which would not be an efficient outcome. Further, the damages an attaching entity like CenturyLink may suffer from OTMR will extend far beyond mere damage to its wireline facilities, potentially including outages to 911 and other 911 services (and the regulatory fines and liabilities that may result from those outages), and liability to the pole owner for noncompliant attachments. The draft order's determination to allow new attachers in the OTMR process to avoid consequential damages under federal law would unfairly shift the burden from these attachers to existing attachers for legal and regulatory obligations that may be triggered by that damage. The Commission therefore should establish regulatory requirements specifying that new attachers triggering the OTMR process are strictly liable for the actual and consequential damages they cause. Such a legal standard not only will ensure safe OTMR work but also avoid the need for protracted litigation.

Work by Utility Pole Owners and Existing Attachers. The draft order would prohibit pole owners and existing attachers from relocating their own attachments, even if they can do so during the abbreviated OTMR make-ready period.[11] This is unreasonable. If a pole owner or existing attacher can meet this accelerated schedule, it should not be precluded from performing its own relocation. Any small loss in efficiency is outweighed by allowing these parties to maintain control over their own facilities, particularly in a process as unproven as OTMR.[12]

Notice Period for Make-Ready. The draft order shortens BDAC's recommended notice period for make-ready from 25 to 15 days.[13] The Commission should adopt the BDAC recommendation to allow pole owners and existing attachers adequate time to review the new attacher's proposed make-ready plan. Especially with a high potential volume of OTMR requests, 15 days is unreasonably short. The

[10] Thus, particularly for these parties, indemnification obligations, including consequential damages, cannot be "left for commercial negotiations." *See* Draft Order at ¶ 70.

[11] Draft Order at ¶ 62.

[12] The new attacher should be responsible for the cost of this relocation work, even if undertaken by the pole owner or existing attacher, as long as it is completed within the deadlines established in the draft order.

[13] *Id.* at ¶ 60.

opportunity to be present when the make-ready is performed does not meaningfully protect the interests of a pole owner or existing attacher. Especially at a high volume, such uncompensated activities are unlikely to be a prudent use of a pole owner's or existing attacher's resources.

Position on the Pole. The Commission should clarify that in performing make-ready, a new attacher should preserve the relative position of those already on the pole. In other words, a new attacher is not permitted to relocate existing attachers' and pole owners' facilities in a way that gives itself a more favorable location on the pole, or that creates attachment outcomes (such as boxing of poles or crisscrossing attachments from pole to pole) that contravene utility standards and safety codes.

ILEC Rates

In the *2011 Pole Attachment Order*, the Commission concluded that ILECs are entitled to just and reasonable rates under Section 224 for their attachments on utility-owned poles.[14] And, if they could prove they are attaching to other utilities' poles on terms and conditions that are comparable to those that apply to a CLEC or cable operator, the ILEC should be afforded the same rate as the comparable attacher.[15] As acknowledged in the draft order, the 2011 order resulted in numerous rate disputes but generally has not yielded lower rates for ILEC attachments.

As explained in its meetings with Commission staff, CenturyLink is concerned that the draft order would not change this situation. CenturyLink supports the Commission's adoption of a presumption that ILECs are similarly situated to other telecommunications attachers and entitled to pole attachment rates, terms, and conditions that are comparable to the telecommunications attachers for new pole attachment agreements.[16] To obtain these comparable rates, terms, and conditions, however, ILECs would be required to terminate and replace their hundreds or even thousands of joint use agreements, which would be expensive, time-consuming, inefficient and unnecessary. Further, as the record in this proceeding has made clear, electric utilities will very likely raise various obstacles to termination, including claiming that all existing attachments will be tied forever to existing rates and agreements.

The last seven years have proven that the better course now is for the Commission to afford ILECs the same type of mandatory and automatic rate relief that is enjoyed by their competitors. The Commission should move toward a uniform regulatory framework and rate structure governing pole attachments of all competing communications providers by a date certain. As an initial step toward this goal, the Commission should immediately establish the pre-2011 upper bound telecommunications rate for all ILEC pole attachment agreements, at least as those agreements are renewed (including through auto-renewal), extended, or renegotiated, and without need to examine whether the ILEC is similarly situated

[14] *In the Matter of Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-41, Report and Order on Reconsideration, 26 FCC Rcd 5240 ¶ 203 (2011) (*2011 Pole Attachment Order*), *subsequent history omitted*.

[15] *Id.* at ¶ 217.

[16] *Id.*

to other attachers. In fact, the Commission already established such an upper bound, tied to the pre-*2011 Pole Attachment Order* telecommunications carrier rate, for complaint proceedings in which the ILEC fails to show that it is similarly situated to other attachers. The draft order would now apply this upper bound for situations when an electric utility rebuts the presumption that an ILEC is similarly situated to other attachers.[17] To the extent existing ILEC agreements provide ILECs benefits not available to other telecommunications attachers, those benefits do not justify denying ILECs just and reasonable pole attachment rates.

If an ILEC in a complaint proceeding is entitled, by default, to an attachment rate no higher than this upper bound, that upper bound should apply to all its pole attachment agreements with other utilities, as they are amended, renewed, extended, or renegotiated. This clarification will not give ILECs rate parity with their competitors in attaching to poles, but it will provide some measure of rate relief without the need for protracted, resource-intensive disputes. The Commission should also specify that this decision constitutes a change in law.

Competitive Disparities

CenturyLink noted that the while the draft item does take incremental steps to reduce competitive disparities, there still exist significant differences in the rates that are charged for pole attachments, both between different classes of regulated pole-owning utilities and, especially, between regulated utilities and unregulated utilities. These disparities impact both the pole owners and pole attachers in ways that affect their incentives and ability to deploy broadband facilities. For example, to the extent that existing attachers are permitted to allow a third party to overlash strand-mounted equipment without providing compensation to a regulated pole owner, such pole owners will have a strong incentive to look for other ways to receive compensation for their pole assets. Mr. Walden noted that non-regulated, private equity-backed entities already are actively seeking to purchase pole assets from regulated utilities. To the extent successful, such transactions would likely lead to higher attachment rates for all attachers. The Commission should continue to take active steps to reduce competitive disparities between pole-owning entities so as to ensure that its overall policy objectives are not frustrated.

Best regards,

/s/ Nicholas G. Alexander
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[17] Draft Order at ¶ 120.

cc: Jay Schwarz
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Marlene H. Dortch
July 23, 2018

Appendix

Proposed Changes to Overlashing Discussion

Add the following italicized text to paragraph 111:

111. We also take this opportunity to clarify several points related to overlashing. *First, this streamlined process applies only to an existing attacher overlashing its existing telecommunications wires on a pole with fiber-optic cable, fiber splice closures, and similar incidental equipment. It does not apply to non-incidental equipment, such as strand-mounted antennas and other RF-emitting devices, batteries, and power supplies, as such equipment is much more likely to present safety and load concerns most properly addressed through the non-OTMR pole attachment process. Second,* if the utility elects to establish an advance notice requirement, the utility must provide advanced written notice to attachers or include the requirement in its pole attachment agreements. . . .

Modify Rule 1.1416(a) and (c) with the following italicized text:

§1.1416 Overlashing

(a) *Prior approval*. A utility shall not require prior approval for an existing attacher that overlashes its existing wires on a pole *with fiber-optical cable, fiber splice closures, and similar incidental equipment. This streamlined process does not apply to equipment that is not incidental to the overlashed wire, such as strand-mounted antennas and other RF-emitting devices, batteries, and power supplies, which is subject to the standard pole attachment process.*

* * * *

(c) *Overlashers' Responsibility*. An existing attacher that engages in overlashing is responsible for its own *incidental* equipment included in the overlashed arrangement and shall ensure that it complies with reasonable safety, reliability, and engineering practices. If damage to a pole or other existing attachment results from overlashing, then the existing attacher is responsible at its expense for any necessary repairs.